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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

**SECOND APPEAL NO. 358 OF 2023
WITH
INTERIM APPLICATION NO. 698 OF 2021
IN
SECOND APPEAL NO. 358 OF 2023**

Satling Gurulingaa Gavahane
Since Deceased through legal
heirs Gurubasu Satling Gavahane

.....Appellant

Vs.

Basweshwar Ramchandra Gavhane and ors

.....Respondents

Ms. Preeti Walimbe h/f Mr. Bhushan Walimbe for the appellant
Mr. Manoj A. Patil for respondent

CORAM : GAURI GODSE J

CLOSED FOR ORDERS ON: 16th JULY 2024

PRONOUNCED ON: 27th AUGUST 2024

ORDER:

1. This second appeal is preferred by defendants 1 and 2 to challenge the judgment and decree passed by the first Appellate Court granting partition and separate possession of the half share to the plaintiff.

2. Respondent no. 1 ("plaintiff") filed a suit for partition and separate possession on the ground that the suit properties are ancestral joint family properties through their common ancestor, who had two sons, Annappa and Gurulinga. Defendant no. 1 is the son of Gurulinga, and defendant no. 2 is the wife of defendant no. 1. The plaintiff is claiming through Annappa. The plaintiff's father, i.e. Ramappa @ Ramachandra, is Annappa's son. The Dandvade Family adopted Annappa after the birth of Ramchandra. In spite of Annappa's adoption, Ramchandra continued in Annappa's biological family, i.e. Gavhane Family. After Gurulinga's death, defendant no. 1 transferred the suit property in his wife's name, i.e., defendant no. 2. Hence, the plaintiff claimed his separate share along with defendant nos. 3 to 11, i.e. children of Ramchandra. The suit was initially dismissed. Hence, the plaintiff and defendant nos. 3 to 11 filed the first appeal, which is allowed granting half share to the plaintiff and defendant nos. 3 to 11 collectively. Hence, defendants nos. 1 and 2 filed this second appeal.

3. Learned counsel for the appellants submitted that the suit was barred by law of limitation. She submitted that defendants nos. 1 and 2 specifically pleaded ouster in the year 1945. She submitted that by

way of mutation entry no. 1225, defendant no. 1's name was entered in the suit property way back in the year 1945. She further submitted that after the suit property was sold to defendant no. 2, her name was also entered by way of mutation entry no. 358. She further submitted that the very fact that since the year 1945, the name of defendant no. 1 was entered in the revenue record, it was clear that defendant no. 1 was openly and uninterruptedly in possession, which shows an animus on the part of defendant no. 1 since the year 1945.

4. Learned counsel for the appellants further submitted that even assuming that the plaintiff's father continued in Gavhane family, the cause of action to seek partition would relate back to the year 1945. She thus submitted that the ouster and animus being since 1945, the suit seeking partition was clearly barred by law of limitation. Learned counsel for the appellants relied upon the findings recorded by the Trial Court to show that till the death of Ramchandra, mutation entries in favour of defendants nos. 1 and 2 were never challenged. She referred to the observations by the Trial Court that the plaintiff's pleadings showed that Ramchandra had purchased various properties, and the ration card produced on record showed that Ramchandra had

separated from the family. Thus, learned counsel for the appellants submitted that the Trial Court rightly held that Ramchandra was never found to have been residing with defendant no. 1 after his father's adoption. Learned counsel thus submitted that there was no joint family of Ramchandra and defendant no. 1.

5. Thus, according to the learned counsel for the appellants, in any case, there was an ouster since the year 1945; hence, Section 115 of The Indian Evidence Act, 1872, would be applicable. She thus submitted that the Court's finding on the point of limitation is incorrect. Learned counsel for the appellants thus submitted that this second appeal would require consideration of the question of law on the point that the suit was barred by limitation. Learned counsel for the appellants to support her submissions relied upon the decision of this court in the case of *Babarao Amburao and Others Vs Baburao Bugaji and Others*¹ and the decision of the Hon'ble Apex Court in the case of *Arshnoor Singh Vs Harpal Kaur and Others*².

6. Learned counsel for the respondents supported the impugned judgment and decree. He submitted that the first Appellate Court

¹ 1955 SCC OnLine MP 51

² (2020) 14 Supreme Court Cases 436

rightly held that Section 115 of the Indian Evidence Act and Articles 58 and 113, as relied upon by the appellants, are not applicable to the facts of the present case. He submitted that the first Appellate Court has rightly relied upon Article 110 of the Limitation Act, which provides that a person excluded from a joint family property has a right to enforce his claim for separate possession within 12 years from the exclusion becoming known to the plaintiff. In the present case, after defendant no. 1 transferred the suit property to defendant no. 2, the plaintiff claimed his separate share by issuing a notice dated 29th June 2005. Defendant no. 1 refused the plaintiff's claim. Hence, the suit filed within 12 years was within limitation as provided under Article 110 of the Limitation Act.

7. I have considered the submissions made by both the parties. Perused the papers of the second appeal. The Trial Court dismissed the suit by holding that the suit properties were not ancestral properties. The second ground for dismissal of the suit was that because of the adoption of the plaintiff's grandfather, he had severed relations with his biological family. Hence, the plaintiff was not entitled to any partition and separate possession. So far as the point of

limitation is concerned, the same was not raised and dealt with by the Trial Court. The first Appellate Court framed points for consideration, including a limitation point. The issue regarding the plaintiff's entitlement to claim share in view of his grandfather's adoption into another family was negatived by the first Appellate Court. In view of the settled legal principles, learned counsel for the appellants has not pressed the said point in this second appeal.

8. Learned counsel for the appellants has argued only the point of limitation on the ground of ouster. She submitted that in view of the mutation entry effected in favour of defendant no. 1 in the year 1945, there was clear ouster, and thus, the suit was barred by limitation. A perusal of the reasons recorded by the First Appellate Court on the point of limitation indicates that the First Appellate Court has referred to Article 110 of the Limitation Act for calculating 12 years from the date of exclusion. The first Appellate Court accepted the plaintiff's case that the cause of action to file suit arose when defendant no. 1 refused to give a separate share as demanded by the plaintiff. Though the mutation entry stood in the name of defendant no. 1, the same cannot be held to be an ouster only on the ground that the plaintiff did not

challenge the mutation entry. It is not in dispute that defendant no. 1 executed the sale deed in favour of defendant no. 2, i.e. his wife, on 12th April 1982. However, the sale deed was only regarding half share in the well. The defendants did not produce the sale deed in favour of defendant no. 2. Hence, by referring to mutation entry 358, the first Appellate Court held that even if the transfer in favour of defendant no. 2 was accepted, the transfer was between the families of defendant no. 1, only transferring half share in the well to his wife. Thus, the first Appellate Court held that not raising any challenge to the sale deed in favour of defendant no. 2 would not disentitle the plaintiff from claiming partition and separate possession.

9. Mutation Entry of the year 1945 is not exhibited during the trial. Thus, mutation entry in favour of defendant no. 1 of the year 1945, as well as the sale deed executed by defendant no. 1 in favour of defendant no. 2, is not accepted as an ouster by the first Appellate Court for the purpose of reckoning the period of limitation. The first Appellate Court relied upon the demand made by the plaintiff on 29th June 2005, seeking partition and separate possession and refusal of defendant no. 1 to give a separate share.

10. The fact that the suit property belonged to the common ancestor of the parties is not in dispute. The adoption of the plaintiff's grandfather in another family does not disentitle the plaintiff's father to be the coparcener of his biological family. Once this legal position is accepted that the plaintiff was part of the Gavhane family and that the suit property was not an independent property of defendant no. 1, the plaintiff is entitled to claim partition and separate possession. The theory of exclusion argued by the learned counsel for the appellants will not disentitle a coparcener to claim partition and separate possession. There is a presumption of jointness of a coparcenary property unless the contrary is proved by cogent evidence. Even assuming that defendant no. 1 was in uninterrupted physical possession of the suit property, the same will not take away the plaintiff's right to seek partition and separate possession, in as much as the law treats him in possession as a co-owner being a coparcener. In the present case, there is no cogent evidence to show that the plaintiff was excluded from the coparcenary property.

11. The first Appellate Court, being the last fact finding court, examined the evidence on record and disbelieved the theory of

exclusion as argued on behalf of the appellants. I do not find any illegality or perversity in the reasons recorded by the first Appellate Court. Thus, the first Appellate Court has rightly referred to Article 110 and held that refusal on the part of defendant no. 1 to grant the plaintiff's claim for separate share and possession made on 29th June 2005 is to be considered as the cause of action for reckoning the period of limitation to file the suit for partition and separate possession. Thus, the ground raised on the point of limitation is not required to be considered by this Court in view of the findings of facts recorded by the first Appellate Court.

12. The second appeal does not raise any other substantial question of law. Hence, the second appeal is dismissed.

13. In view of the dismissal of the second appeal, pending Interim Application No. 698 of 2021 is disposed of as infructuous.

[GAURI GODSE, J.]